

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VIRGINIA PERKINS	:	DETERMINATION
	:	DTA NO. 815918
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1991 through August 31, 1994.	:	

Petitioner, Virginia Perkins, 328 Waterside Avenue, Northport, New York 11768-1258, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1991 through August 31, 1994.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 15, 1998 at 1:15 P.M., with additional evidence and briefs to be submitted by June 19, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Mathews, Esq., of counsel).

ISSUES

I. Whether petitioner established that the tax shown as due on a Notice of Determination was paid to the Tax Compliance Division before the issuance of the notice.

II. Whether petitioner established that the tax shown as due on a sales tax return filed for the quarter ending August 31, 1994 was paid at the time the return was filed.

III. Whether petitioner established that sales tax returns filed for the assessment period correctly stated taxable sales and tax due on those sales.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Virginia Perkins, three notices of determination of sales and use taxes due as follows:

Date Issued	Assessment No.	Period	Tax Due
February 6, 1995	L-010060988-4	December 1, 1991 - February 29, 1992	\$ 635.91
February 6, 1995	L-010060987-5	June 1, 1994 - August 31, 1994	\$ 4,588.98
October 17, 1994	L-009693752-5	December 1, 1989 - August 31, 1994	\$27,095.01

2. Each of the three notices informed petitioner that she was determined to be a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Fair Dinkum Corporation (“Fair Dinkum”). Each notice assessed interest and penalties in addition to the tax due.

Assessment Number L-010060988-4

3. Assessment number L-010060988-4 was issued on the basis of a sales tax return filed by Fair Dinkum on March 20, 1992 with a partial payment of the tax shown as due on the return. The return showed tax collected and due in the amount of \$5,147.20. A payment of \$2,000.00 was remitted with the return, leaving a balance due of \$3,147.20 plus penalty and interest. The Division issued a notice to Fair Dinkum assessing tax of \$3,147.20, interest of \$183.84 and penalty of \$432.66. Later payments made by Fair Dinkum totaling \$3,127.79 were applied to the assessment. A Notice of Determination was then issued to petitioner for the balance due of \$635.91.

4. In April 1992, the Division closed the restaurant operated by Fair Dinkum because of unpaid taxes. Petitioner recalls that Fair Dinkum Corporation owed back taxes of \$12,000.00 at that time. In order to continue operating, she borrowed money which was paid over to the Division. Petitioner remembers conversations with a Tax Compliance Agent, Catherine Fallon, and she was certain that she would not have been able to reopen her business if she had not satisfied all outstanding tax liabilities. For this reason, she believes that the sales taxes assessed for the period December 1, 1991 through February 29, 1992 were paid.

5. The Division submitted a Tax Compliance Division form headed "District Office Seizure Request and Notification." It indicates that as of April 9, 1992 Fair Dinkum had fixed and final liabilities for corporation franchise, withholding and sales taxes totaling \$6,630.93. The penalty and interest on these liabilities was \$3,532.09, yielding a total amount due of \$10,168.02. The two sales tax liabilities shown are for the quarters ending February 28, 1991 and August 20, 1991. Thus, the assessment under discussion does not appear to have been included in the seizure notice.

6. The Division has copies of four checks given to it by petitioner on April 23, 1992, showing payments of \$7,900.00, \$1,000.00, \$700.00 and \$1,000.00 for a total payment of \$10,600.00. There is no evidence of any other payments made by Fair Dinkum or petitioner in connection with the April 1992 seizure, although petitioner remembers making additional payments.

7. The sales and use tax return filed by Fair Dinkum for the period December 1, 1991 through February 29, 1992 bears a date stamp of March 20, 1992 from the Suffolk Office of the Tax Compliance Division. It indicates that a payment of \$2,000.00 was made at the time the return was filed. A deposit serial number, 79110894, appears on the return. A bank check dated

March 20, 1992, number 1093, drawn on the account of Fair Dinkum at the National Westminster Bank, shows a payment to the "Department of Taxes" of \$2,000.00. The memo line states: "Acc Dec 1/ Feb 29 '92."

8. The Division's Accounts Receivable System shows that payments totaling \$3,127.82 were applied to the balance due for the quarter ending February 29, 1992. The source of those payments and the applications of them are as follows: (1) a payment of \$400.00 made on April 15, 1994 was applied in full; (2) a payment of \$3,775.53 made on December 8, 1992 and \$97.88 from that payment applied to this period; and (3) a payment of \$7,900.00 made on April 23, 1992 and \$2,629.91 from that payment applied to this period.

Assessment Number L-010060987-5

9. Assessment number L-010060987-5 was issued on the basis of a sales tax return filed by Fair Dinkum on October 4, 1994 without the remittance of any of the tax shown as due on the return. The return showed tax collected and due in the amount of \$4,588.98. The Division assessed tax in this amount plus interest of \$214.54 and penalty of \$642.41, yielding a total due of \$5,445.93.

10. Because of financial problems encountered by Fair Dinkum, petitioner formed a second corporation, Dinky-Di, Inc., to operate the restaurant business. Petitioner submitted a check drawn on the National Westminster Bank account of Dinky-Di Corp., dated September 19, 1994. It shows a payment of \$2,205.71 to N.Y. State Sales Tax for the quarter ended August 31, 1994. It bears deposit serial number 39103759. Petitioner claims that a check for \$2,383.27 drawn from the account of Fair Dinkum was submitted to the Division to pay the balance of the tax owed for the period June 1, 1994 through August 31, 1994. A copy of the sales tax return for this quarter, submitted by the Division, bears a deposit serial number of 39760156.

11. The Division's assessments receivable records do not show any payments applied to Fair Dinkum's sales tax account for the quarterly period ending August 31, 1994.

Assessment Number L-009693752-5

12. Assessment number L-009693752-5 was issued as the result of a field audit of the books and records of Fair Dinkum Corporation for the period December 1, 1989 through May 31, 1994.

13. The audit of Fair Dinkum was assigned to John J. McLoughlin, Tax Auditor, in December of 1992. At that time, Fair Dinkum was doing business as Australian Country Inn, a restaurant. On January 14, 1993 and October 6, 1993, Mr. McLoughlin sent letters to Fair Dinkum requesting it to sign and return consents to extend the period of limitation for assessing sales and use taxes. Petitioner executed these consents on behalf of Fair Dinkum. A consent dated February 11, 1993 extended the period of limitation for assessment of sales and use taxes against Fair Dinkum for the period December 1, 1989 through August 31, 1990 to December 20, 1993. The consent dated October 6, 1993 extended the period of limitation for assessment of sales and use taxes against Fair Dinkum for the period December 1, 1989 through August 31, 1991 to December 20, 1994.

14. The auditor's handwritten log of contacts with the taxpayer shows that petitioner referred the auditor to three different accountants for assistance in conducting the audit. There are entries showing numerous telephone calls from the auditor to petitioner and to the accountants she said were representing her: Anton Castiglia, David Lasher and Thomas Pirro. Apparently, most of the auditor's communications revolved around his attempt to have consents extending the limitation period executed and to obtain the corporation's sales tax records.

15. By letter, dated May 4, 1994, Mr. McLoughlin scheduled an audit appointment on May 18, 1994 and asked Fair Dinkum to make available on the appointment date all books and records pertaining to its sales and use tax liability for the audit period. This letter followed numerous verbal requests for records made to petitioner and to the accountants whom she claimed were representing her. Each of the accountants informed Mr. McLoughlin that he did not have the corporation's records and, at some point, that he had ceased representing Fair Dinkum or petitioner.

16. On September 22, 1994, Mr. McLoughlin received a telephone call from a fourth accountant, Stanley Weisz, who stated that he had been retained to represent Fair Dinkum in the audit. Mr. Weisz stated that he had not yet reviewed the corporation's books and records and that he would telephone Mr. McLoughlin to set up an audit appointment. Ten weeks elapsed without a telephone call from Mr. Weisz.

17. Finally, the auditor resorted to an estimate of Fair Dinkum's tax liability for the audit period. He compared Fair Dinkum's Federal income tax return for the fiscal year ended October 31, 1990 with its quarterly sales tax returns for that period. This showed that Fair Dinkum reported gross sales of \$378,261.00 on its Federal return but reported gross sales of only \$292,389.00 on its State sales tax returns. Using these figures, the auditor calculated a margin of error of 29.369 percent and applied this error factor to the 18 quarters within the audit period to estimate total, unreported gross sales of \$336,346.00. All of the gross sales were deemed to be taxable since there was no evidence of nontaxable sales. Total tax due for the audit period was determined to be \$27,095.00.

18. Petitioner takes issue with the auditor's allegation that none of the accountants she referred him to actually represented her. Fair Dinkum's books and records were in the

possession of Thomas Pirro, an accountant petitioner hired to prepare tax returns and represent her before the Internal Revenue Service and the Division. Mr. Pirro and petitioner are engaged in a dispute regarding payment for his services. As a result, he has declined to return to petitioner any books and records which may be in his possession.

19. Since petitioner was in financial difficulties, she entrusted bookkeeping and other accounting duties to a young employee who was studying for licensing as a certified public accountant. At hearing, she contended that the young man had included exempt sales, sales tax and tips in his calculation of gross sales for Federal income tax purposes. Petitioner believes that his error explains the difference between gross sales, as reported on Fair Dinkum's Federal income tax returns and gross sales reported on State sales tax returns. She offered into evidence five folders containing summaries of sales for the periods: December 1, 1992 through February 28, 1993; March 1, 1993 through May 31, 1993; June 1, 1993 through August 31, 1993; September 1, 1993 through November 30, 1993; and March 1, 1994 through May 31, 1994. Petitioner later submitted a set of summaries for the period December 6, 1993 through February 27, 1994.¹

20. The sales summaries submitted by petitioner consist of computer generated reports, called Cash Reports. The Cash Reports appear to be weekly summaries of all receipts (cash or credit), broken down into various categories for different analyses. For example, service charges

¹The record of hearing was left open for the submission of documents by petitioner and to give the Division an opportunity to review and comment on documents submitted by petitioner at hearing and by mail. Following an exchange of letters and documents by the parties, petitioner was given until June 5, 1998 to submit whatever evidence and argument she had in support of her position, and the Division had until June 19, 1998 to respond. Letters submitted by petitioner, dated June 9, 1998 and June 15, 1998, were not considered as they were not filed in accordance with this schedule.

(tips paid using a credit card) were analyzed as a percentage of total sales and credit card sales were broken down by credit card company.

21. Sales tax and tips were not included in the category of net sales as shown in the Cash Reports. The Cash Report for the week of March 1, 1993 is exemplary. A summary of receipts by payment method shows total receipts of \$6,340.88. This total is broken down as follows:

Cash	\$2,603.66
MasterCard/Visa	1,706.36
Diners/Carte Blanche	160.95
American Express	1,261.39
Manager Comp.	224.50
Promotion	8.14
Check	255.23
Overtime	<u>120.65</u>
Total:	\$6,340.88

Cash receipts were arrived at by subtracting charged tips (\$365.71) from total cash received (\$2,969.37). Thus, tips were not included in total receipts of \$6,340.88. In a "Tax Category Analysis," the Cash Report shows total tax collected of \$496.80. When this amount is subtracted from total receipts of \$ 6,340.88, it yields net sales of \$5,844.08. The tax due on net sales of \$5,844.08 is \$496.80. The only way to reconcile the Cash Reports is to conclude that tips and tax were not included in net sales as shown in those reports.

22. The following table compares net sales as shown in the Cash Reports submitted by petitioner (summarized for each period) with gross sales reported on sales tax returns.

Period	Tax Return	Cash Reports
December 1, 1992 - February 28, 1993	\$ 60,254.00	\$ 88,670.00
March 1, 1993 - May 31, 1993	\$ 72,780.00	\$100,059.97

Period	Tax Return	Cash Reports
June 1, 1993 - August 31, 1993	\$ 57,320.00	\$ 59,279.57 ²
September 1, 1993 - November 30, 1993	\$ 64,382.00	Incomplete information
March 1, 1994 - May 31, 1994	\$ 84,124.00	\$ 88,664.28
December 1, 1993 - February 28, 1994	\$ 64,487.00	\$ 60,375.68 ³

23. In addition to the Cash Reports, petitioner submitted handwritten summaries. A summary was attached to a copy of the sales tax return filed for each quarter. The calculations in these summaries vary from quarter to quarter.

(a) The notes for the quarter ending February 28, 1993 summarize the weekly amounts reported in the Cash Reports. As noted, that amount was higher by \$28,426.00 than the amount reported as taxable sales on the sales tax return for that quarter.

(b) The notes for the quarter ending May 31, 1993 vary from the Cash Reports. The notes have four columns. The weekly periods being summarized are listed in the first column. The other columns are not labeled. The second column appears to be net sales, but for some weeks the figures shown differ from the net sales figures in the Cash Reports. For instance, for the week of March 15, 1993, the Cash Report shows net sales of \$5,651.71, while the summary shows sales of \$5,266.71, a difference of \$385.00. This figure can be traced on the Cash Report to an item labeled "SALES * 05;" however, there is no way to determine what is included in that category. In any case, such sales were included in net sales on the Cash Report but not in the summary. This and similar entries account for the difference in total sales shown in the

²The cash report was missing for the period June 1, 1998 through June 7, 1998; however, a work paper included with the reports shows that petitioner calculated tax due for this period of \$436.98. I calculated taxable sales for the period of \$5,140.94 by dividing tax due by the tax rate of 8.5%.

³A cash report was missing for the week of December 1, 1993.

summaries (\$97,116.02) and net sales per the Cash Reports (\$100,059.97), a total difference of \$2,943.95. The third column contains figures which are not identified in the record and cannot be traced to the Cash Reports. The fourth column appears to be tax due, and the total due is shown as \$8,275.77 (\$20.91 less than the tax due on \$97,116.02 at a rate of 8½%). Fair Dinkum reported tax due of \$6,061.86.

(c) The notes for the quarter ending August 31, 1993 do not contain a summary of net sales. There is, however, a listing of sales tax due per week, totaling tax due for the quarter of \$4,807.09. A note indicates that this amount was paid. From a review of the Cash Reports, it appears that the accountant subtracted an item identified as "Theater Charges" from net sales before calculating sales tax due. Assuming that the accountant's calculation of tax due is correct, the sales tax return for this period and the Cash Reports reconcile.

(d) There are no summary reports for the other periods listed in the table above.

24. At hearing, petitioner referred to having provided original records of sales to the auditors at the time of the audit. Upon questioning, it was established that she was referring to documents provided at a conference conducted by the Division's Bureau of Conciliation and Mediation Services ("BCMS"). As a result of that conference, BCMS issued a Conciliation Order, dated April 4, 1997, sustaining the statutory notices.

SUMMARY OF THE PARTIES' POSITIONS

25. Petitioner claims that no tax was owed by Fair Dinkum for the period December 1, 1991 through February 29, 1992 when the Notice of Determination was issued to her on February 6, 1995. The basis for this claim is petitioner's belief that the Division's Tax Compliance Division closed the restaurant business operated by Fair Dinkum and would not have allowed it to reopen if there were any outstanding liabilities for periods up to April 23, 1992.

Petitioner agrees that payments totaling \$10,600.00 were made on April 23, 1992. She asserts that other payments were made after that date and that the Division should have records of such payments. The basis for her contention is her memory that “after presentation of these monies [in the amount of \$10,600.00] I was told that we still could not reopen until yet further funds were paid.” (Letter to John E. Mathews, Esq., May 16, 1998). She contends that the amount actually collected was close to \$12,000.00 and suggests that some of these funds may have been misapplied by the Division. It is her understanding that the entire amount paid at that time was to be applied to sales taxes owed, although the seizure request refers to withholding and corporation franchise tax liabilities as well. The Division argues that there is no evidence that it received and misapplied any payments for this period.

26. Petitioner claims that she paid the tax shown as due on the return filed for the period June 1, 1994 through August 31, 1994. She presented a canceled check showing a payment for this period of \$2,205.71. The Division did not address petitioner’s submission and offered no explanation regarding the check drawn on the Dinky-Di account.

27. The Division concedes that the consents extending the period of limitation for assessment of sales and use tax against Fair Dinkum did not extend the statutory period of limitation for issuing a Notice of Determination to petitioner. (*See, Matter of Bleistein*, Tax Appeals Tribunal, July 27, 1995.) Based on this concession, the Division agreed to cancel the tax assessed for the period December 1, 1989 through August 31, 1991 in the amount of \$10,800.73. In addition, the Division reviewed the Cash Reports, summaries and other documentation submitted by petitioner and agreed to certain adjustments in the tax assessment based on those documents.

(a) The Division agrees that the correct amount of tax was paid for the quarter ending August 31, 1993 and agrees to cancellation of the tax assessed for that period.

(b) For the quarter ending May 31, 1994, the Division agreed to reduce the tax due to \$535.00. The Cash Reports for the period show net sales of \$88,664.28. The tax due on that amount is \$7,536.46. Fair Dinkum reported taxable sales of \$82,368.00, and it paid tax of \$7,001.28 for the period, producing a liability of \$535.00. The Division's concession for this period is based on its acceptance of the accuracy of the Cash Reports.

(c) For the quarter ending February 28, 1994, the Division agreed to reduce the tax assessed from \$1,609.82 to \$302.13. This was based on the Division's agreement to accept the accuracy of the Cash Reports, although the sales figures for one week were missing. The Division estimated taxable sales for that week of \$4,917.76 and total sales for the period of \$65,293.44. Sales tax due on that amount at a rate of 8.5% is \$5,549.94. Fair Dinkum paid sales tax for the period of \$5,247.81, producing a liability of \$302.13. The Division's estimate of sales for the first week of the period was based on a statement made by petitioner in a letter of June 5, 1998 where she explained the Cash Reports submitted with the letter. The letter states, as pertinent:

The return filed for this quarter [December 1, 1993 through February 28, 1994] reported sales of \$64,487.00. Two periods are missing. I simply could not locate a cash report for the period 12/01/93. It would have been similar to the following week of \$4,917.96.

28. The Division's concessions reduce the total tax due on Assessment Number L-009693752 to \$11,740.70.

29. Petitioner claims that the Cash Reports and the summaries which she submitted in evidence prove that her filed sales tax returns more accurately reflect Fair Dinkum's taxable sales

than does the Division's assessment. Although she could not locate Cash Reports for the entire period in issue, she claims that the documents she submitted support her primary contention — that her employee erroneously included taxes and tips in his calculation of gross sales for Federal income tax purposes. She referred specifically to the documents submitted for the period March 1, 1993 through May 31, 1993 as supporting her claims. In a letter dated June 5, 1998, she states:

The record contains notes made at a later time (before this proceeding) when someone noticed that the accountant's gross sales numbers of \$97,116.02 could not be right as stated and that they in fact reported gross sales without removing tips or tax. Deleting \$8,284.80, representing sales taxes at 8 ½ percent, \$14,284.40, representing approximate tips at 15%, you come to \$74,293.82 and close to the reported sales of \$72,780. In fact, the work sheet indicates that actual tips were higher based on records no longer available. It was not unusual for customers to leave a 20% tip. In any event, this analysis is far less fanciful than that proposed by the department and is thoroughly supported by the contemporaneous work sheets submitted.

30. Petitioner maintains that the sales tax returns reflect actual taxable sales and that any discrepancies between Fair Dinkum's sales tax returns and its Federal income tax returns were caused by an employee whose record keeping was faulty.

CONCLUSIONS OF LAW

A. Two of the notices of determination issued to petitioner (assessment numbers L-010060988-4 and L-010060987-5) were based upon sales tax returns filed without full payment of the tax shown as due on those returns. Petitioner's only argument regarding the first notice is that the Division failed to appropriately apply payments made by Fair Dinkum in April 1992. However, petitioner was unable to establish that any payments were made by Fair Dinkum in addition to those credited to her by the Division. Once a notice of determination is issued, the burden of proof is on petitioner to demonstrate that the basis for assessment is

unreasonable or that the amount of tax assessed is incorrect (*Matter of Micheli Contracting Corp. v. New York State Tax Commn.*, 109 AD2d 957, 486 NYS2d 448). Inasmuch as petitioner has been unable to show additional payments, the Notice of Determination for the period December 1, 1991 through February 29, 1992 is sustained.

B. For the period June 1, 1994 through August 31, 1994, petitioner has established that tax was paid in the amount of \$2,205.71 (see Finding of Fact “10”). Petitioner was given an opportunity to present a canceled check or other proof of payment for the balance due, but she failed to provide any evidence. Accordingly, the tax due for this period shall be reduced to \$2,383.27.

C. In *Matter of On-Site Petroleum Unlimited* (Tax Appeals Tribunal, February 8, 1996) and *Matter of Bleistein* (Tax Appeals Tribunal, July 27, 1995), the Tax Appeals Tribunal held that consents to extend the statute of limitation signed on behalf of a corporation are not sufficient to extend the statute for the individual officers. In each case, the Tribunal found that to bind the officers with a consent signed on behalf of the corporation would be inconsistent with settled law that the liability of an officer is separate and independent from that of the corporation (*Matter of Yellin v. New York State Tax Commn.*, 81 AD2d 196, 440 NYS2d 382; *see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, *appeal dismissed in part, denied in part*, 72 NY2d 938, 532 NYS2d 845 [the issue of the personal liability of the officer could not be reviewed through the application of the corporation for a redetermination of its liability]; *Matter of Mustafa*, Tax Appeals Tribunal, December 27, 1991 [Administrative Law Judge’s cancellation of corporate assessment due to a procedural error on the part of the Division does not result in dismissal of the assessment against petitioner]). The Division concedes that these decisions require the cancellation of tax assessed against petitioner for

periods outside the three-year statute of limitations. Therefore, the Notice of Determination issued for the period December 1, 1989 through August 31, 1994 shall be modified by cancellation of the tax assessed for the period December 1, 1989 through August 31, 1991.

D. Where a taxpayer's records are insufficient or inadequate to permit an exact computation of the sales and use taxes due, the Division is authorized to estimate the tax liability on the basis of external indices (Tax Law § 1138[a][1]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91, 93; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452). Here, the record establishes that numerous contacts were made with petitioner and accountants identified by petitioner as representatives of Fair Dinkum before the Division made the decision to estimate sales taxes due on the basis of the information available. In addition, the Division made a formal, written request for the books and records of the corporation in a letter dated May 4, 1994. Inasmuch as no books and records were provided, it was appropriate for the Division to estimate tax due for the audit period on the basis of whatever information it had available to it at that time.

Where the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (*Matter of Ristorante Puglia, Ltd. v. Chu, supra*; *Matter of W. T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, 157, *cert denied* 355 US 869) but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Lefkowitz*, Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was

erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully, supra*).

E. In this case, the Division elected to estimate tax due on the basis of a Federal income tax return filed by Fair Dinkum for the year ended October 31, 1990. A comparison of the sales tax returns and the Federal return for this one-year test period revealed a significant discrepancy in reported Federal gross sales and reported gross sales per the sales tax returns. This discrepancy was translated into an error rate which was then applied to all of petitioner's reported gross sales to determine additional sales subject to sales tax. In light of the paucity of information made available, the audit method resorted to by the Division was reasonable. Moreover, the use of gross receipts as reported on Federal income tax returns to estimate taxable sales has been found to be reasonable in similar situations (*see, e.g., Matter of Scotto*, Tax Appeals Tribunal, January 16, 1992; *Matter of Sidel*, Tax Appeals Tribunal, July 3, 1991).

Petitioner has not shown that the audit method employed was unreasonable. Petitioner's claim that the audit methodology was unreasonable is premised on her contention that an employee included exempt sales, sales tax and tips in his calculation of gross sales for Federal income tax purposes. It is her position that this mistake explains the discrepancy between the 1990 Federal income tax return and sales tax returns filed for a comparable period. However, petitioner produced no evidence that such an error was made in filing the Federal income tax returns. In her letter of June 5, 1998, petitioner posits the theory that the summary of sales for the period March 1, 1993 through May 31, 1993 shows sales of \$97,116.02 representing gross sales without removing tax and tips. Since petitioner was unable to provide a clear explanation of the Cash Reports and summary, I reviewed them carefully to determine whether they substantiated this theory. As noted, they did not. Tax and tips were separately categorized in

the Cash Reports and subtracted from gross sales to calculate net sales subject to tax. The Cash Reports for the period ending May 31, 1993 show total net sales of \$100,059.97. An unidentified category of sales was subtracted from net sales to calculate net sales, per the summary, of \$97,116.02. This amount did not include tax and tips; therefore, petitioner's speculations regarding the summary sheet (see Finding of Fact "28") are not supported by her own documents.

F. The Division has accepted the accuracy of the Cash Reports and on the basis of those reports has agreed to reduce the tax due for the quarters ended August 1, 1993, May 31, 1994 and February 28, 1994 as outlined in Finding of Fact "26". Petitioner has offered no reason why the Cash Reports should be deemed accurate for the periods in which they substantiate Fair Dinkum's sales tax returns and not for periods in which they show underreporting of sales by Fair Dinkum, and she offered no other evidence to demonstrate the incorrectness of the Notice of Determination; therefore, no other adjustments are warranted.

G. The petition of Virginia Perkins is granted as indicated in Conclusions of Law "B", "C" and "F" and Findings of Fact "10" and "26"; the notices of determination issued on February 6, 1995 and October 17, 1994 shall be modified accordingly; and, in all other respects, the petition is denied.

DATED: Troy, New York
October 29, 1998

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE